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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GARY MIKE OSUNA,

Defendant and Appellant.

H045720

(Santa Clara County

Super. Ct. Nos. B1689286, C1649390)

Defendant Gary Mike Osuna violated the terms of his probation after pleading no contest to second degree robbery, petty theft of personal property, identity theft, and possession of methamphetamine. The trial court revoked probation and sentenced Osuna to three years in state prison.

Appointed counsel filed an opening brief stating the case and the facts, but raising no specific issues on appeal. After we reviewed the record under *People v. Wende* (1979) 25 Cal.3d 436, we requested supplemental briefing from the parties on whether the trial court erred in the imposition of any fines or fees without determining whether Osuna had an ability to pay. (See *People v. Dueñas* (2019) 30 Cal.App.5th 1157 [imposition of certain fines and fees without determining defendant's ability to pay was a violation of due process].) Osuna now contends the court did so err.

For the reasons below, we conclude the record shows Osuna has the ability to pay the fines and fees at issue in this appeal. We will affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural Background

In case No. B1689286, the prosecution charged Osuna with two counts: Count 1—robbery in the second degree (Pen. Code, §§ 211, 212.5, subd. (c))¹; and count 2—petty theft of personal property (§§ 484, 488). The information further alleged Osuna was armed with a deadly weapon at the time of the offense. (§ 1203, subd. (e)(1).) Osuna pleaded no contest to both charges and admitted the allegation.

In case No. C1649390, the prosecution charged Osuna with three counts: Count 1—acquiring or retaining possession of personal identifying information with intent to defraud and with a prior conviction (§ 530.5, subd. (c)(2)); count 2—possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)); and count 3—possession of controlled substance paraphernalia (Health & Saf. Code, § 11364). Osuna pleaded no contest to counts 1 and 2, and the trial court granted the prosecution’s motion to dismiss count 3.

The trial court sentenced Osuna in both cases in June 2017. The court suspended imposition of sentence and granted a three-year term of probation, including 11 months in county jail in case No. B1689286, and six months in case No. C1649390 to be served concurrently. The court imposed various fines and fees, including: An \$80 court security fee (in both cases); a \$60 criminal conviction assessment (in both cases); a \$300 restitution fine with a 10 percent administrative fee (in both cases); probation supervision fees not to exceed \$20 per month (in both cases); a \$50 criminal laboratory analysis fee with \$155 in penalty assessments (in case No. C1649390); a \$150 drug program fee with \$465 in penalty assessments (in case No. C1649390); a \$70 AIDS education fine with \$217 in penalty assessments (in case No. C1649390); \$65 in direct restitution to Macy’s (in case No. B1689286); a \$10 fine under section 1202.5 with \$31 in penalty assessments

¹ Subsequent undesignated statutory references are to the Penal Code.

(in case No. B1689286); and a \$129.75 criminal justice administration fee (in case No. B1689286). The court also imposed but suspended a \$300 probation revocation restitution fine in both cases. Osuna did not lodge any objections and did not request a hearing on his ability to pay these fines and fees. The record does not include any notice of appeal from this judgment.

In March 2018, the trial court found Osuna had violated the terms of his probation. The court revoked probation and ordered Osuna to serve three years in state prison, consisting of a three-year term in case No. B1689286 and a concurrent two-year term in case No. C1649390. The court also ordered Osuna to pay the two probation revocation fines (\$300 in each case) that had previously been suspended, and the court imposed but suspended parole revocation fines in the same amount. The court ordered that all fines and fees could be collected from any money Osuna earned while in custody. Again, Osuna failed to object to the imposition of fines and fees, and he did not request a hearing on his ability to pay them. Osuna filed a notice of appeal on March 26, 2018, following the probation revocation order.

We appointed counsel to represent Osuna in this court. Appointed counsel filed an opening brief stating the case and the facts, but raising no specific issues on appeal. We notified Osuna of his right to submit written argument on his own behalf within 30 days. He submitted a letter requesting a reduction of his conviction for second degree robbery to a misdemeanor on the grounds that the offense constituted shoplifting.

After we reviewed the record under *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), we requested supplemental briefing from the parties on whether the trial court erred in the imposition of any fines or fees without determining whether Osuna had an ability to pay. (See *Dueñas*, *supra*.)

B. Facts of the Offenses

In July 2016, an asset protection officer at a Macy's in Sunnyvale saw Osuna take a watch worth \$65 into the men's fitting rooms. After Osuna left the fitting room, the officer found the watch box and a removed sensor, but not the watch.

In November 2016, the same asset protection officer again saw Osuna enter the Sunnyvale Macy's store. Osuna took a watch from its box, put the watch in his pocket, and continued walking around the store. He then took some coats into a fitting room, and he later put a pair of underwear into his pocket. When Osuna tried to walk out of the store, the officer confronted him and told him to go back into the store. A physical struggle ensued, and the two fell onto the ground. After a bystander helped to subdue Osuna, a pair of scissors was found in his back pocket.

In August 2016, the police stopped Osuna while he was riding a bicycle. The officer searched him and found a glass pipe, 1.1 grams of methamphetamine, and mail belonging to other people. Osuna admitted that he used the items in the mail to make credit cards.

II. DISCUSSION

In response to our request for supplemental briefing, Osuna contends the trial court erred by imposing fines and fees without first determining whether he had the ability to pay them. The Attorney General contends Osuna forfeited this claim by failing to object below. Even assuming Osuna may raise the claim, the Attorney General argues the record does not establish any inability to pay, nor any consequences of his asserted inability to pay.

As an initial matter, it appears we have no jurisdiction over many of the fines and fees imposed in this matter. Most of the fines and fees were imposed when the trial court initially granted probation in June 2017, but Osuna failed to timely appeal from that judgment. His notice of appeal in this matter was filed following the trial court's order of revocation in March 2018. "In general, an appealable order that is not appealed becomes

final and binding and may not subsequently be attacked on an appeal from a later appealable order or judgment. [Citations.] Thus, a defendant who elects not to appeal an order granting or modifying probation cannot raise claims of error with respect to the grant or modification of probation in a later appeal from a judgment following revocation of probation.” (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421.)

Nonetheless, upon revoking probation, the trial court further imposed \$600 in probation revocation restitution fees that had previously been suspended, and the court imposed but suspended parole revocation fees in the same amount. We will assume for the purposes of this appeal that Osuna may appeal solely from that judgment.

Turning to the Attorney General’s claim of forfeiture, we conclude Osuna did not forfeit his claim. As a general matter, the failure to object to fines and fees forfeits any challenge on appeal. For this proposition, the Attorney General relies on *People v. Aguilar* (2015) 60 Cal.4th 862, 864 (failure to object to various fees in trial court precluded defendant from raising appellate challenge to the fees), and similar cases. But none of the cited cases concerned a substantial change in the applicable law, as the court of appeal effected in *Dueñas* after the trial court imposed the fees in Osuna’s case.

In *Dueñas*, the Court of Appeal for the Second District held for the first time that it violates due process under both the United States and California Constitutions to impose certain fines and fees without first determining the defendant’s ability to pay. (*Dueñas, supra*, 30 Cal.App.5th at p. 242.) The forfeiture rule does not apply “ ‘when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change.’ [Citations.]” (*People v. Black* (2007) 41 Cal.4th 799, 810.) That exception applies here. “No court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant’s ability to pay. Moreover, none of the statutes authorizing the imposition of the fines, fees or assessments at issue authorized the court’s consideration of a defendant’s ability to pay. [. . .] When, as here, the defendant’s challenge on direct

appeal is based on a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial, reviewing courts have declined to find forfeiture.” (*People v. Castellano* (2019) 33 Cal.App.5th 485, 489.) Given that fines and fees imposed here were mandated by statute, it is highly likely an objection would have been futile. (*People v. Welch* (1993) 5 Cal.4th 228, 237 [reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile].) Accordingly, we will excuse the failure to object.

Turning to the merits of the claim, we conclude Osuna has the ability to pay the \$600 in probation revocation restitution fees, as the record shows Osuna has the ability to gain lawful employment. He reported graduating from high school, he attended college, and he had been employed as an engineer in quality control. Furthermore, the trial court ordered him to pay fines and fees from any money earned in prison. (See *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837 [ability to pay includes a defendant’s ability to obtain prison wages].)

Finally, as to Osuna’s claim that we should reduce his conviction for second degree robbery to shoplifting, we lack jurisdiction to consider this claim, as Osuna failed to timely appeal or obtain a certificate of probable cause with respect to that judgment. Finding all claims without merit, we will affirm the judgment.

III. DISPOSITION

The judgment is affirmed.

Greenwood, P.J.

WE CONCUR:

Elia, J.

Grover, J.